Supreme Court, U. S.
FILED
MAY 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1977**

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and
CITIBANK, N.A.,

*Petitioners,*

*v.*

THE FINANCE ADMINISTRATION OF THE CITY
OF NEW YORK AND THE FINANCE ADMINISTRATOR
OF THE CITY OF NEW YORK,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners The Chase Manhattan Bank, N.A. and Citibank, N.A. petition for a writ of certiorari to review the judgments of the Court of Appeals of the State of New York dated and entered December 21, 1977. Separate judgments were entered as to Chase and Citibank, but the cases were consolidated for purposes of briefing and oral argument, and only one opinion was written by the Court of Appeals. Because the cases involve identical questions, a single petition has been filed under Rule 23(5) of the Rules of this Court.

### Opinions Below

The majority and dissenting opinions of the Court of Appeals of the State of New York are reported at 43 N.Y.2d 425, 372 N.E.2d 789 and 401 N.Y.S.2d 1001, and

appear in Appendix B. The decision of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, is reported at 55 A.D.2d 531 and 389 N.Y.S.2d 547, 1021, and appears in Appendix D. The Finance Administration of the City of New York issued separate final determinations, findings of fact, conclusions of law and decisions as to each petitioner, none of which has been reported but which appear in Appendix E.

## Jurisdiction

The judgments of the Court of Appeals were entered on December 21, 1977. A timely motion for reargument was denied (Appendix C) on February 22, 1978, and this petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1966).

## Questions Presented

Whether the New York City commercial rent or occupancy tax is invalid for the periods in question as applied to petitioners, national banks, because Section 5219 of the Revised Statutes of the United States, 12 U.S.C. § 548, *as amended by* Pub. L. No. 91-156, 83 Stat. 434 and Pub. L. No. 92-213, § 4(a), 85 Stat. 775, prohibited the application of such tax to national banks absent state legislation affirmatively imposing that tax on national banks.

This question involves the following subsidiary questions:

1. Whether the requirement in Pub. L. No. 91-156 of affirmative legislative action authorizing the imposition on national banks of certain taxes was complied with by the New York State legislature when the legislature only increased the general rate of taxation but took no action to change the incidence of taxation to include national banks.



2. Whether in construing the language of Pub. L. No. 91-156, the Court of Appeals properly characterized the commercial rent or occupancy tax as one on tangible personal property under state law in disregard of the terms of Pub. L. No. 91-156 and pertinent decisions of this Court as to the interpretation of federal statutes.

## Statutes Involved

The federal statutes involved are Section 5219 of the Revised Statutes of the United States, 12 U.S.C. § 548 (1957); and the Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434, *as amended by* Act of December 22, 1971, Pub. L. No. 92-213, § 4(a), 85 Stat. 775. These statutes are set forth in Appendices F and G. The New York statute involved is Laws of New York, 1963, ch. 257, *as amended by* Laws of New York, 1970, ch. 166, N.Y. Unconsol. Laws § 9447 (McKinney 1974), set forth in Appendix H.

## Statement of the Case

The Chase Manhattan Bank, N.A. and Citibank, N.A. are national banks that lease and occupy premises in New York City for the purposes of business.

During 1973, the Finance Administration of the City of New York sent Chase and Citibank notices of determination which included assessments for alleged deficiencies in payment of the New York City commercial rent or occupancy tax (the "Commercial Rent Tax") for the tax years ended May 31, 1971 and May 31, 1972. The Commercial Rent Tax is a tax levied on persons occupying premises for commercial purposes based on the rent paid for such occupancy. Laws of New York, 1963, ch. 257, *as amended by* Laws of New York, 1970, ch. 166, N.Y. Unconsol. Laws § 9447 (McKinney 1974).

At hearings requested by the banks and held before the Finance Administration, the banks argued that they are immune from the Commercial Rent Tax for the periods in question under applicable federal laws, *i.e.*, 12 U.S.C. § 548 and Pub. L. No. 91-156, as amended, which govern the extent to which national banks may be taxed by state and local governments, and this Court's decision in *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339 (1968).

In December 1975 and March 1976, the Finance Administration's referee issued separate findings of fact, conclusions of law and decisions with respect to Citibank and Chase. (Appendix E) The referee concluded that notwithstanding their status as national banks, the banks are liable for the Commercial Rent Tax. Final determinations were issued by the Finance Administration in an aggregate amount of $4,197,907.39, plus interest. (Appendix E)

Chase and Citibank commenced proceedings in the Supreme Court, New York County, to reverse and annul the determinations of deficiencies, again relying on the federal statutes and *First Agricultural National Bank* v. *State Tax Commission*. The proceedings were transferred for hearing to the Appellate Division of the Supreme Court and consolidated for purposes of oral argument.

In the Appellate Division, the banks argued that in 12 U.S.C. § 548 Congress enumerated the only ways in which states and their subdivisions could tax national banks and that the Commercial Rent Tax was not one of the permissible methods of taxation. Although in 1969 Congress amended 12 U.S.C. § 548 to permit national banks to be generally subject to the same state and local taxes as state banks, prior to January 1, 1973, any tax in effect before the enactment of Pub. L. No. 91-156 (the legislation amending 12 U.S.C. § 548) and not previously imposed on national banks—*i.e.*, a tax such as the Commercial Rent Tax—could



be imposed only if its imposition was authorized by affirmative state legislative action. Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434, *as amended by* Act of December 22, 1971, Pub. L. No. 92-213, § 4(a), 85 Stat. 775. No such affirmative action had occurred and, accordingly, Chase and Citibank argued that the Commercial Rent Tax could not be lawfully imposed on national banks.

On December 6, 1976, by a four-to-one vote, the Appellate Division confirmed without opinion the final determinations of the Finance Administration. (Appendix D) The dissenting judge, however, found that under 12 U.S.C. § 548 and Pub. L. No. 91-156 the Commercial Rent Tax was illegally imposed on national banks.

In a consolidated appeal before the Court of Appeals, the banks again argued that under applicable federal law for the period in question national banks are immune from taxes such as the Commercial Rent Tax. In a four-to-three decision (opinion by Judge Fuchsberg), the Court of Appeals held that the Commercial Rent Tax can be lawfully imposed on national banks for the period prior to January 1, 1973. (Appendix B)

That decision is based on the Court of Appeals' erroneous construction of two key provisions in Pub. L. No. 91-156. First, the Court of Appeals decided that the "affirmative action" mandated by Pub. L. No. 91-156 does not require a conscious or positive decision by the legislature to impose a tax on national banks previously immune from such tax. Thus that court was able to find that a 1970 amendment by the state legislature to the Commercial Rent Tax which merely raises the rate of taxation for those taxpayers already subject to the tax, but which gives no hint of any consideration of Pub. L. No. 91-156 or imposition of the tax on previously-immune national banks, constitutes the requisite affirmative action.

Second, the Court of Appeals decided that the Commercial Rent Tax is exempt under section 3(b) of Pub. L. No. 91-156 because it is a tax on tangible personal property

under New York state law, so that the tax can be imposed on national banks even in the absence of affirmative action of the state legislature.

The three dissenting judges in the Court of Appeals disagreed with the majority on both grounds. Concluding that the affirmative action required by Pub. L. No. 91-156 is "a conscious and manifested determination on the part of the state legislature to subject national banks to the imposition of the permitted state taxes," the dissent would have held that the 1970 rate amendment of the Commercial Rent Tax does not constitute such affirmative action. The dissent also disagreed with the majority's characterization of the Commercial Rent Tax as a tax on tangible personal property, saying that the question is how the tax is to be regarded under federal, not state, law.

A motion for reargument, timely filed by the banks, was denied on February 22, 1978. (Appendix C)

## Reasons for Granting the Writ

The New York State Court of Appeals has erroneously decided an important question of federal law concerning the extent to which states and their subdivisions may tax national banks. That decision is in conflict in principle with numerous decisions by this Court that national banks may be taxed by the states and their subdivisions only as expressly permitted by Congress; it is also in direct conflict with the explicit language chosen by Congress to express how national banks can be taxed. The Court of Appeals has made a nullity of Congress' requirement in section 3(a) of Pub. L. No. 91-156 of "affirmative action" by state legislatures by permitting a tax such as the Commercial Rent Tax to be imposed on national banks for the period prior to January 1, 1973, even in the absence of affirmative action.



The Court of Appeals also erroneously applied state, rather than federal, standards in characterizing the tax for purposes of determining whether federal immunity exists for petitioners. For more than a century Congress and this Court have been deeply concerned with the problem of state taxation of national banks and have frequently addressed the issue. *See, e.g., Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268 (1976); *First Agricultural National Bank* v. *State Tax Commission, supra; M'Culloch* v. *Maryland*, 17 U.S. 415, 4 Wheat. 316 (1819); Act of June 3, 1864, ch. 106, § 41, 13 Stat. 111. By looking to New York state law to construe Pub. L. No. 91-156, the Court of Appeals has ignored this Court's firmly established rule concerning the application of federal law in determining a federally-granted right, privilege or immunity. It has also ignored the distinction clearly manifested by Congress on the face of Pub. L. No. 91-156 between a tax on the occupancy of real property and a tax on tangible personal property.

If allowed to stand, the narrow impact of the decision will be the effect on petitioners' tax liability for the Commercial Rent Tax for the period prior to January 1, 1973. The broader impact of the decision, however, falls on the at least 13 other national banks with main or branch offices[1] in New York City[2] whose liability for the Commercial Rent Tax may still be open. Moreover, there are 4,722 national banks in this country[3] whose tax liability is potentially affected by the questions raised by this petition concerning the nature of the affirmative action required by section 3(a) of Pub. L. No. 91-156 and the proper characterization of a tax under federal law for purposes of state taxation of national banks.

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1. Rand McNally & Co., *International Bankers Directory*—New York State 94-182, 193-215 (1st 1977 ed.).

2. The state legislation for the Commercial Rent Tax applies only to cities with populations of 1,000,000 persons or more; New York City is the only city in the state with the requisite population.

3. *International Bankers Directory, supra* at P60.

**1. The Court of Appeals' decision conflicts with this Court's decisions concerning state taxation of national banks and the language of Pub. L. No. 91-156.**

This Court has repeatedly held that the states can tax national banks only as expressly authorized by Congress. *E.g., First Agricultural National Bank* v. *State Tax Commission, supra; Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931); *Owensboro National Bank* v. *Owensboro*, 173 U.S. 664 (1899). That authorization is found in Section 5219 of the Revised Statutes of the United States, 12 U.S.C. § 548, which, prior to its amendment in 1969, allowed states to tax national banks only by imposing a tax on the bank's equity, dividends, or income, or measured by its net income. The Commercial Rent Tax is not included within those permitted methods of taxation.

In 1969, Congress amended 12 U.S.C. § 548 to permit states to impose on national banks generally the same state and local taxes as are imposed on state banks. However, that expanded authority took effect only after January 1, 1973. Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434, *as amended by* Act of December 22, 1971, Pub. L. No. 92-213, § 4(a), 85 Stat. 775. For the period prior to January 1, 1973, section 3(a) of Pub. L. No. 91-156, the "Saving Provision", restricted state and local taxation of national banks as follows:

> "(a) ••• [P]rior to January 1, [1973],[4] no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless
>
> "(1) the tax was imposed on that class of banks prior to the enactment of this Act, or

4. Athough originally to have expired on December 31, 1971, the Saving Provision of Pub. L. No. 91-156 was extended to December 31, 1972. Act of December 22, 1971, *supra*.



> "(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act."

The Saving Provision was enacted to preclude immediate imposition on national banks of taxes from which the banks were previously immune. Otherwise, in states where tax structures had been devised to provide equal tax treatment of national and state banks based on national bank immunity from certain taxes, national banks would be unfairly overtaxed if they were suddenly subject to additional taxes. S. Rep. No. 91-530, 91st Cong., 1st Sess. 6 (1969). Therefore, if national banks were to be subject to taxes from which they had previously been immune, Congress wanted the imposition of such taxes to be the product of a positive and conscious decision by the state legislature, and it imposed the requirement of affirmative action.

The importance that Congress placed on the need for affirmative action and its intention that the decision to tax national banks be manifested in a positive and unmistakable manner are revealed in the legislative history of Pub. L. No. 91-156. The Report of the Senate Committee on Banking and Currency includes the following:

> "The committee realizes that for many years the tax structure within the States has been drawn in recognition of the different positions of State and National banks with respect to liability for State taxes. In effect, the States have adopted many different formulas in an attempt to equalize the total tax burden between State and National banks. If by congressional action banks were automatically subject to taxes which they had not been previously paying, in addition to the taxes which they are now paying, the effect may be to destroy the degree of equality that the State legislature, by conscious effort, attempted to achieve. Accordingly, the committee believes it wise to require *positive State legislative action* as a prerequisite to the imposition on

banks of the additional taxes authorized by the bill." S. Rep. No. 91-530, 91st Cong., 1st Sess. 6 (1969); 1969 *U.S. Code, Congressional and Administrative News* 1594, 1598-99. (Emphasis supplied.)

Similarly, in the final Conference Report, the managers on the part of the House of Representatives stated:

> "[W]hile at the same time very firmly committing to the several States responsibility for their own tax policies, the conference substitute includes a saving provision to the effect that except for sales taxes, documentary taxes, and property taxes, *a tax may not be applied to a bank after the enactment of this legislation unless* either the tax was applicable before the enactment of this legislation, or *the State legislature authorizes its imposition by affirmative action* taken after the enactment of this legislation." H.R. Rep. No. 91-728, 91st Cong., 1st Sess. 5 (1969); 1969 *U.S. Code Congressional and Administrative News* 1602-03. (Emphasis supplied.)

Because the Commercial Rent Tax is imposed under authority of state legislation in effect prior to the enactment of Pub. L. No. 91-156[5] and was not imposed on national banks prior to that enactment,[6] it is a tax which can only be imposed by affirmative action of the state legislature according to the Saving Provision.

Notwithstanding the explicit statutory requirement that the imposition of the tax on national banks be authorized by affirmative action and the equally clear legislative history cited above, the Court of Appeals has construed the federal statute as not requiring a conscious decision by the state legislature to impose a pre-existing tax on national banks for the first time. Instead, the Court has decided that

5. Laws of New York, 1963, ch. 257, *as amended by* Laws of New York, 1970, ch. 166, N.Y. Unconsol. Laws § 9447 (McKinney 1974) (rate amendment).

6. *First National City Bank* v. *City of New York Finance Administration*, 36 N.Y.2d 87, 91-92 (1975).



action in general with respect to the tax, rather than affirmative action imposing the tax on national banks, will suffice.

Specifically, the Court of Appeals held that Chapter 166 of the Laws of New York, 1970, authorizing a general rate increase in the Commercial Rent Tax, satisfied the requirement of the Saving Provision. In its opinion, however, the state court was only able to say that the rate increase was "action" that "necessarily involved 'affirmative' conduct" because the amendment took the form of republishing the original Commercial Rent Tax statute with new rates.

The Court of Appeals was unable to cite any evidence whatsoever of a legislative decision to impose the Commercial Rent Tax on national banks, and, indeed, no such evidence exists. As the dissent (per Judge Jones) stated:

> "No shred of contemporaneous proof suggests that either the city administration or the State Legislature was even aware that section 5219 had been amended or that thereby the Congress had granted authority for expanded State taxation of national banks.
>
> "In such circumstances I cannot conclude that legislative action, taken wholly without reference to the Federal statute, constitutes the 'affirmative action' contemplated by the Congress when it authorized additional State taxation of national banks." 43 N.Y.2d at 435; 372 N.E.2d at 794; 401 N.Y.S.2d at 1006.

In *First Agricultural National Bank* v. *State Tax Commission, supra,* one of this Court's most recent cases concerning state taxation of national banks, it was decided that the Massachusetts sales tax and use tax were invalid as applied to national banks because the taxes were not among those permitted by 12 U.S.C. § 548. Rejecting the argument

that national banks could be taxed in ways other than those permitted by 12 U.S.C. § 548, this Court said:

> "Now this Court is asked to change what legislative history and prior decisions have established is the precise meaning of an Act of Congress. This we cannot do. For, as we pointed out above, the banking field has traditionally been an area of particular congressional concern marked by legislation responsive to new problems." 392 U.S. at 345.

Yet, by deciding that a mere rate change, enacted without any consideration of national banks, authorized imposition of a new tax on national banks, the Court of Appeals has done what this Court would not do. The Court of Appeals has changed the precise meaning of Pub. L. No. 91-156 by disregarding the requirement of affirmative legislative action. Under the state court's decision, Congress could have merely permitted national banks to be subject to a new tax by any amendment to the taxing statute without regard to whether the amendment was related to national bank immunity. Instead, having used the words "affirmative action", Congress clearly indicated a conscious decision by the legislature, manifested in positive terms, is required before a tax such as the Commercial Rent Tax can be imposed on national banks for the period in question.

The decision of the Court of Appeals is clearly wrong and should be remedied by this Court in order properly to restrict the power of states and their political subdivisions to tax national banks and to restore the meaning of the words "affirmative action" in Pub. L. No. 91-156.



**2. The Court of Appeals' decision erroneously looks to state, rather than federal, law in characterizing the tax.**

As a second ground for its decision, the Court of Appeals relied on subsection (b) of the Saving Provision of Pub. L. No. 91-156 which excuses certain taxes from the requirement of affirmative action. That subsection provides:

> "b) The prohibition of subsection (a) of this section does not apply to
>
> (1) any sales tax or use tax complementary thereto,
>
> (2) any tax (including a documentary stamp tax) on the execution, delivery, or recordation of documents, or
>
> (3) any tax on tangible personal property (not including cash or currency), or for any license, registration, transfer, excise or other fee or tax imposed on the ownership, use or transfer of tangible personal property,
>
> imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof."

The Court of Appeals held that because the Commercial Rent Tax is regarded under New York law as one on tangible personal property it falls within subsection (b)(3) and the requirement for affirmative action does not apply to it. The Court's error lies in characterizing the tax under state law. Because the question is whether national banks are immune from the tax under federal law, state law is not determinative as to the nature of the tax and this Court is not bound by the Court of Appeals' characterization of the tax. *Diamond National Corp.* v. *State Board of Equalization, supra; First Agricultural National Bank* v. *State Tax Commission, supra* at 347; *Society for Savings* v. *Bowers,* 349 U.S. 143 (1955).

Pub. L. No. 91-156 clearly reveals on its face that Congress did not intend that a tax on the occupancy of real property, such as the Commercial Rent Tax, be considered a tax on tangible personal property or that it be excluded from the Saving Provision. In section 1(a) of Pub. L. No. 91-156, Congress listed categories of taxes which a state could impose for the first time on a national bank with its principal office outside the state. Two of those categories are:

> "'(2) Taxes on real property or on the occupancy of real property located within such jurisdiction.
>
> • • •
>
> '(4) Taxes on tangible personal property (not including cash or currency) located within such jurisdiction."

Thus, in section 1(a) of Pub. L. No. 91-156, Congress expressly distinguished taxes on the occupancy of real property from taxes on tangible personal property. Then, in section 3(b) of the same statute, Congress designated three of the five categories of taxes found in section 1(a) to be excused from the Saving Provision and the requirement of affirmative action. Although taxes on tangible personal property were excused, taxes on the occupancy of real property—such as the Commercial Rent Tax—were not.

Only by ignoring the terms of the federal statute itself and erroneously applying state law instead could the Court of Appeals reach its decision. But as this Court stated in *Jerome* v. *United States*, 318 U.S. 101 (1943), where the question was also whether terms in a federal statute could be assigned their meaning under state law:

> ". . . we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide. (*United States* v. *Pelzer*, 312 U.S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control." 318 U.S. at 104.



Similarly, in *Society for Savings* v. *Bowers, supra,* where the issue was whether a state property tax, essentially measured by the value of United States bonds held by two savings banks, was imposed on the banks and was therefore invalid as a direct tax on federal obligations, or on the banks' depositors and their intangible property interests in the banks, this Court stated:

> "The [state] court's mere conclusion that the tax is imposed on the depositors is no more than a characterization of the tax. 'Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.'" 349 U.S. at 151.

In *Diamond National Corp.* v. *State Board of Equalization, supra,* this Court refused to accept a state court's characterization as to the incidence of state and local taxes designed to undermine national bank immunity under federal law and reaffirmed their immunity under 12 U.S.C. § 548.

The necessity here for the rule set forth in these cases is illustrated by the differences among the states in their classification of certain taxes. For example, in Kentucky, a leasehold is considered intangible personal property, while in New Jersey, in some circumstances it may be assessed as real estate. *Compare Kentucky Tax Commission* v. *Jefferson Motel, Inc.*, 387 S.W.2d 293, 295 (Ky. 1965) *with* N.J. Stat. Ann. § 54:4-2.3 (West 1960). Obviously, for Pub. L. No. 91-156 to have uniform application throughout

the country, federal law must govern the proper characterization of taxes.

Thus, in applying principles of state law, the Court of Appeals has disregarded applicable decisions of this Court and has impermissibly expanded the power of the states to tax national banks.

### Conclusion

The petition for a writ of certiorari should be granted.

Dated: May 22, 1978

Respectfully submitted,

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# Appendices

# APPENDIX A

## Judgment of the Court of Appeals—
## The Chase Manhattan Bank, N.A.

*Remittitur*

COURT OF APPEALS
STATE OF NEW YORK

*The Hon. Charles D. Breitel, Chief Judge, Presiding*

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No. 457

THE CHASE MANHATTAN BANK, N.A.,
*Appellant,*

*vs.*

THE FINANCE ADMINISTRATION OF
THE CITY OF NEW YORK, &ANO., &C.,
*Respondents.*

*The appellant in the above entitled appeal appeared by* Dewey, Ballantine, Bushby, Palmer & Wood: *the respondent(s) appeared by* W. Bernard Richland, Corporation Counsel.

*The Court, after due deliberation, orders and adjudges that the* judgment is affirmed, with costs. Opinion by Fuchsberg, J. All concur except Jones, J., who dissents and votes to reverse in an opinion in which Jasen and Wachtler, JJ., concur.

*The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the* Supreme Court, New York County,
*there to be proceeded upon according to law.*

*I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.*

*/s/* DONALD M. SHERAW
Deputy Clerk of the Court

*Court of Appeals, Clerk's Office, Albany, December 21, 1977.*

## Judgment of the Court of Appeals—Citibank, N.A.

*Remittitur*

COURT OF APPEALS
STATE OF NEW YORK

*The Hon. Charles D. Breitel, Chief Judge, Presiding*

No. 456

CITIBANK, N.A. (FORMERLY KNOWN AS FIRST NATIONAL CITY BANK),
*Appellant.*

*vs.*

THE CITY OF NEW YORK FINANCE ADMINISTRATION,
*Respondent.*

*The appellant in the above entitled appeal appeared by* Shearman & Sterling; *the respondent appeared by* W. Bernard Richland, Corporation Counsel.

*The Court, after due deliberation, orders and adjudges that the* judgment is affirmed, with costs. Opinion by Fuchsberg, J. All concur except Jones, J., who dissents and votes to reverse in an opinion in which Jasen and Wachtler, JJ., concur.

*The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the* Supreme Court, New York County, *there to be proceeded upon according to law.*

*I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.*

*/s/* DONALD M. SHERAW
Deputy Clerk of the Court

*Court of Appeals, Clerk's Office, Albany, December 21, 1977.*



# APPENDIX B

## Opinions of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

No. 456

CITIBANK, N.A. (formerly known as First National City Bank),
*Appellant,*

*vs.*

THE CITY OF NEW YORK FINANCE ADMINISTRATION,
*Respondent.*

No. 457

THE CHASE MANHATTAN BANK, N.A.,
*Appellant,*

*vs.*

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK, &ano., &c.,
*Respondents.*

Argued September 6, 1977; decided December 21, 1977.

(456) W. Foster Wollen & John T. Klug, NYCity, for appellant.

W. Bernard Richland, NYC Corporation Counsel (Samuel J. Warms of counsel) for respondent.

(457) J. Paul McGrath & Bob D. Mannis, NYC, for appellant.

W. Bernard Richland, NYC Corporation Counsel (Samuel J. Warms of counsel) for respondent.

FUCHSBERG, J.

The two petitioners, who each lease and occupy premises in the City of New York, where they have their principal places of business, are banking associations chartered under the laws of the national Government. In separate proceedings, brought under CPLR article 78 and considered together, they challenge imposition upon them of the city's commercial rent tax (Administrative Code of City of New York, ch 46, tit L) covering the period from June 1, 1970 through May 31, 1972.[1]

The appeals to us are from judgments of the Appellate Division, which, one Justice dissenting, confirmed final determinations of the New York City Finance Administration adverse to the banks and dismissed their petitions.

The pivotal issue is whether, because of the provisions of applicable Federal law, the appellants, as national banks, were immune from the tax assessed for the period in question. In particular, the resolution of this case turns on an analysis of the effect on New York tax laws of the enactment of United States Public Law No. 91-156 (83 US Stat 434), which in essence permitted States and their subdivisions to tax national banks on an equal footing with State banks.

Adopted in 1969, United States Public Law No. 91-156 constituted the then latest exercise of the Federal Government's authority, recognized since the historic decision in *McCulloch v Maryland* (17 US 316, 432, 439), to allow States to tax national banks (*Agricultural Bank v Tax Comm.*, 392 US 339, 343, *Owensboro Nat. Bank v Owensboro,* 173 US 664; see, also, *Liberty Nat. Bank & Trust Co. v Buscaglia,* 26 AD2d 97, revd 21 NY2d 357, affd upon rearg 23 NY2d 933).

1. Correctness of the amounts assessed ($2,702,909.84 in petitioner Citibank's case and $3,097,732.94 in that of petitioner Chase) does not appear to be in dispute.



As its legislative history makes clear, the passage of the 1969 statute was precipitated by State reaction to the United States Supreme Court decision in the *Agricultural Bank* case *(supra).* In its holding that Massachusetts could not apply its sales tax to purchases made by national banks within its boundaries the court there reiterated that Federal statutory enumeration of the taxes States might levy on national banks carried with it a prohibition on the imposition of any others (see 115 Congressional Record 19909 [1969]; HR Rep No. 91-290, 91st Cong, 1st Sess, pp 6-7 [1969]). In the wake of that decision, a large number of States and localities found themselves deprived of tax sources on which they had come to rely; representatives of the overwhelming majority of these pressed Congress to relieve their plight (see Testimony Received in Consideration of HR 7491 and Related Bills: Hearings Before the House Committee on Banking and Currency, 91st Cong, 1st Sess 6-27 [1969]; for the effects in New York see *Liberty Nat. Bank & Trust Co. v Buscaglia, supra).*

Public Law No. 91-156 brought a two-stage change in section 5219 of the United States Revised Statutes (US Code, tit 12, § 548); it provided for "temporary" and "permanent" amendments. The "permanent" change eliminated the exemption of national banks from taxes to which State banks were subject in the State where the national banks' principal offices were located; this change, to go into effect on January 1, 1972 (Public Law No. 91-156, § 2, subds [a], [b]), subsequently was delayed until January 1, 1973 (Public Law No. 92-213, § 4, subd [a]; 85 US Stat

775).[2] The "temporary" one (Public Law No. 91-156, § 1) and a "saving provision" (§ 3) were (as amd by Public Law No. 92-213) to govern taxation of National banks during the transition period between December 24, 1969, the enactment date of the new law, and January 1, 1973.

It is on subdivision (a) of section 3 of the saving provision that appellants rely.[3] They point out that, during the temporary period, that section protected national banks from losing any pre-existing immunity from State tax laws unless and until the Legislature of a State took "affirmative action" to apply such taxes to them. The banks also assert that the New York City commercial rent tax, which had been in force since 1963, when it was authorized by chapter 257 of the Laws of New York of that year, was neither newly enacted nor the object of the requisite "affirmative action" of the Legislature before the tax assessments in litigation here were levied. For its part, the city's position is that its exercise of "affirmative action" is to be found in the passage by the New York State Legislature of chapter 166 of the Laws of 1970 which modified the original State law authorizing the rent tax, this though the 1970 enactment did not expressly refer to national banks.

2. It is agreed that appellants have been subject to the New York City rent tax since that time and therefore this litigation encompasses no subsequent period.

3. The pertinent text of subdivision (a) of section 3 of the Public Law No. 91-156 reads as follows:

"(a) * * * [P]rior to January 1, [1973], no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless

"(1) the tax was imposed on that class of banks prior to the enactment of this Act, or

"(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act."



Having fully considered these contentions, and, in the course of doing so, other pertinent provisions of Public Law No. 91-156 as well, we hold, on two independent grounds, that the rent tax was properly levied on the petitioners for the period in question.

Because the parties have preferred to focus on whether there was "affirmative action", we initially discuss the effect of legislation by which the city's commercial rent tax was amended to increase its rates significantly as of June, 1970 (L 1970, ch 166, amdg Administrative Code of City of New York, § L46-1.0, subd 3).[4] We conclude that its passage constituted such action.

The banks seek to read into the Federal statute a requirement that, before imposition of State taxes on national banks, even though the levying statute is a general one, a conscious and explicit decision had to be made to subject these banks to the tax.[5] But the Federal statute contains no such requirement. And, since even legislative decisions to allow existing rules of law to stand may be dynamic in their effect, where they bring meaningful increases in the rates of a revenue measure it is difficult to perceive how they can be regarded as anything but permeated with "action".

Moreover, the mode of enacting amendments is to re-enact the statute as amended much as a codicil republishes a will. It is a well-established proposition of law that an amend-

4. In a graduated scale, the rates were increased up to a maximum of 50% over the immediately pre-existing ones.

5. While the city may not have gone through the formality of expressing an intent to regard the amendment to the tax law as "affirmative action", it had already made known its ongoing concern with the question of the tax's continued viability in a letter submitted to the relevant Congressional Committee by a Representative who had authored remedial legislation (Testimony [on] HR 7491, pp. 14-15).

ment is a re-enactment of the statute amended, albeit without any break in the continuity between the statute before amendment and the statute after amendment (see *Lyon v Manhattan Ry. Co.*, 142 NY 298, 303-304). In fact, draftsmen of bills and other interested members of Legislatures, in considering bills providing for amendments, read them against existing law. And an amendment is enacted exactly like a wholly new statute. Thus, the amendment to the tax statute here, passed by the New York State Legislature and signed by the Governor, necessarily involved "affirmative" conduct.

From the point of view of Congress, it was the possibility that inequitable or double taxation might be imposed immediately on national banks that was the crux of its concern. There was certainly nothing in the legislative history to suggest an intention to postpone taxation on national banks under general statutes like New York City's commercial rent tax law. To the contrary, the saving provision was designed to avoid upsetting sophisticated, delicately balanced State statutes enacted to equalize taxation between bank and nonbank entities; the Congressional Managers' Conference Report makes that most evident (1969 US Code, Congressional and Administrative News, vol 2, pp 1594, 1598-1599, 1602). Since any State legislative attempt to amend such a statute unavoidably would alert the Legislature to enactment of the new Federal statute, the saving provision therefore could be effected without requiring the States to mention national banks explicitly in amendatory tax legislation.

We, therefore, turn now to the other, and at least equally dispositive ground for our determination. It derives from subdivision (b), rather than subdivision (a), of section 3



of Public Law No. 91-156. Subdivision (b) of section 3 expressly provides that the prohibition of (a) "does not apply to * * * any tax on tangible personal property * * * or for any license, registration, transfer, excise or other fee or tax imposed on the ownership, use or transfer of tangible personal property imposed by a State". Such taxes are by its terms excused entirely from the requirement for either affirmative action or new enactment. For these excepted taxes, the "temporary" amendment of section 5219 allowed automatic imposition of nondiscriminatory State taxes without any further legislative input.

New York City's commercial rent tax from its inception has been and continues to be regarded as one on tangible personal property. Judge (later Chief Judge) Fuld, in *Ampco Printing-Advertisers' Offset Corp. v City of New York* (14 NY2d 11), spelled out the precise nature of the property interest of commercial tenants embraced by this local law. After describing the tax as one "imposed on a tenant of taxable premises according to his base rent for the tax year", and noting that "'tenant' is defined as anyone who pays rent as lessee, sublessee, licensee or concessionaire", he continues, more generally, "'It is significant to note that nowhere in the Tax Law has the Legislature characterized a leasehold as taxable real property. Such omission is understandable, as a lease for years is deemed personalty [cases cited].' * * * In any event, though, the tax could not be considered a tax on 'intangible' personal property. A leasehold has consistently been regarded as tangible. (See, e.g., *People ex rel. American Ice Co. v State Bd. of Tax Comrs.*, 153 App. Div., 532, 539 [majority opinion], 541 [minority opinion], mod. 207 N. Y. 766 * * *.)" (*Ampco Printing-Advertisers' Offset Corp. v City of New York*, 14 NY2d 11, 20, 21, 22, *supra*, app dsmd 379 US 5.)

The proposition that a leasehold constitutes tangible personal property for tax purposes has cut both ways. In the *Ampco* case, it resulted in validation of a tax liability; in *Matter of Fort Hamilton Manor v Boyland* (4 NY2d 192) and in *Matter of Grumman Aircraft Eng. Corp. v Board of Assessors of Town of Riverhead* (2 NY2d 500, 507, cert den 355 US 814) it led to mitigation or removal of a tax burden. Also pertinent, in light of subdivision (b) of section 3's reference not only to "any tax on tangible personal property" but to an "excise * * * tax imposed on the ownership [or] use" of such property as well, is that, in *Ampco* (*supra,* at pp 21, 23), the court characterizes the tax here as an excise tax on the use of property. (See, also, *Matter of Penney Co. v Lewisohn,* 40 AD2d 67, affd 33 NY2d 528; 2 Powell, Real Property, par 221, subd[2].)

The correctness of this conceptualization of a leasehold interest as tangible personal property in the context of Public Law No. 91-156 is underscored upon further research of that statute's legislative history. Thus, while our attention has not been directed to any report separately discussing a State-imposed rent tax on facilities used by a national bank in the State where its principal office is located, we find it significant that subdivision (a) of section 1 explicitly validates such taxes when imposed by a State on a national bank whose principal office is in another jurisdiction. It does so, *inter alia,* by authorizing a tax on "the occupancy of real property" of such out-of-State national banks (Public Law No. 91-156, § 1, subd [a], amdg US Rev Stat, § 5219, subd 5 par [b], cl [2]).

Furthermore, referring to this amendment, the Senate Committee on Banking and Currency minced no words in reporting that "the taxes listed in the new section 5 (b) * * * are not considered to be taxes on intangible personal property as that term is used in the new section 5 (a), and they could be imposed on national banks by the States during the period up to January 1, 1972, as well as after that date" (US Sen Rep No. 91-530, 91st Cong., 1st Sess 3 [1969]; 1969 US Code, Congressional and Administrative News, vol 2, pp 1595-1596).



We do not regard this comment as any the less telling because it occurred in the course of an explanation of the effect of the amendment on taxes on out-of-State national banks, since the undeniable over-all design of the amendments to the then existing Federal legislative scheme was to give States expanded power to subject national banks headquartered within their borders to all nondiscriminatory taxes rather than to a limited "laundry list" (115 Congressional Record 19912 [1969]). There is consequently no reason to believe that the express equating of "occupancy of real property" with "tangible personal property" did not apply.

Accordingly, we conclude that Public Law No. 91-156 did not immunize petitioners from liability for New York City commercial rent taxes during the years at issue. It follows that the judgments from which the appeals are taken should each be affirmed.

JONES, J. (dissenting). I would reverse the judgment of the Appellate Division in each case and annul the determination of the City Finance Administration imposing the New York City commercial rent and occupancy tax on petitioners national banks for the period prior to January 1, 1973.

In 1969 the Congress amended section 5219 of the Revised Statutes of the United States (US Code, tit 12,

§ 548) specifically to authorize State taxation of national banks in prescribed ways. Broad authorization was granted on a permanent basis beginning in 1972 (later deferred to 1973); interim provisions were prescribed with respect to the transitional period prior to 1973. We are here concerned only with such interim provisions.

I read section 3 (subd [a], par [2]) of the amendatory Federal statute (US Public Law No. 91-156), authorizing State taxation in the period prior to January 1, 1973 in the event of "affirmative action of the State legislature", as requiring a conscious and manifested determination on the part of the State legislature to subject national banks to the imposition of the permitted State taxes. The record of the deliberations of the Senate Committee on Banking and Currency supports this conclusion: "The committee realizes that for many years the tax structure within the States has been drawn in recognition of the different positions of State and National banks with respect to liability for State taxes. In effect, the States have adopted many different formulas in an attempt to equalize the total tax burden between State and National banks. If by congressional action banks were automatically subject to taxes which they had not been previously paying, in addition to the taxes which they are now paying, the effect may be to destroy the degree of equality that the State legislature, by conscious effort, attempted to achieve. Accordingly, the committee believes it wise to require *positive State legislative action* as a prerequite to the imposition on banks of the additional taxes authorized by the bill." (Sen Rep 91-530, 91st Cong, 1st Sess 6 [1969]; 1969 US Code, Congressional and Administrative News, vol 2, 1594, 1598-1599; emphasis supplied.) (See, also, the final conference report



of the managers on the part of the House of Representatives: HR Rep No. 91-728, 91st Cong, 1st Sess 5 [1969]; 1969 US Code, Congressional and Administrative News, vol 2, pp 1602-1603.)

The enactment of chapter 166 of the Laws of 1970 by our State Legislature constituted no such "affirmative action". It served only to increase the rates of the pre-existing tax. Nothing in the record before us reveals that the City of New York, the sole beneficiary of the increased rates, in seeking the amendment of the State Legislature in enacting it had extension of the tax to national banks even remotely in mind. The Governor's message of necessity on which enactment of chapter 166 was predicated makes no reference to taxation of national banks. Notwithstanding particularized postargument requests to the city therefor, no statement of estimated revenue to be realized from the amendment or other document submitted by the city in support of the enactment of chapter 166 has been furnished in which any reference is made to estimated income to be derived from taxes to be paid by national banks or to any other aspect of taxation of national banks. No shred of contemporaneous proof suggests that either the city administration or the State Legislature was even aware that section 5219 had been amended or that thereby the Congress had granted authority for expanded State taxation of national banks.

In such circumstances I cannot conclude that legislative action, taken wholly without reference to the Federal statute, constitutes the "affirmative action" contemplated by the Congress when it authorized additional State taxation of national banks. Nor can I conclude that the enactment of the 1970 increase in rates may be so construed as to

support the city's alternative contention that the "saving provision" of the Federal statute had no application inasmuch as the taxes in question were not imposed under the authority of pre-existing State legislation but rather were imposed under the authority of the 1970 amendment only.

I must also disagree with respect to the second ground proffered by the majority to sustain imposition of the New York City commercial rent and occupancy tax on petitioners, viz., application of subdivision (b) of section 3 of Public Law No. 91-156. The decision in *Ampco Printing-Advertisers' Offset Corp. v City of New York* (14 NY2d 11, app dsmd 379 US 5), heavily relied on, is by no means conclusive that in the present context the commercial rent tax is a tax on tangible personal property. What was necessarily decided by the court in *Ampco*, which dealt with the validity of the commercial rent and occupancy tax under our State Constitution, was that the tax there was not a prohibited ad valorem tax on intangible personal property. Even if that case be read, however, as characterizing the tax for State constitutional purposes as a tax on tangible personal property—which was not necessarily there determined—such a description could not and should not be binding for present purposes or classification within the contemplation of Congressional statutes. Nothing suggests that the opinion in *Ampco* was written with a Federal statute like Public Law No. 91-156 in mind. There was not then posed or considered the question now before this court —how the commercial rent and occupancy tax is to be regarded for purposes of Federal, not New York, law authorizing local taxation of national banks. Similarly *Matter of Fort Hamilton Manor* v *Boyland* (4 NY2d 192) and



*Matter of Grumman Aircraft Eng. Corp.* v *Board of Assessors of Town of Riverhead* (2 NY2d 500, cert den 355 US 814) arose in a totally distinguishable context. Finally, even the City of New York itself has never asserted that authorization for the present tax is to be found in subdivision (b).

Chief Judge BREITEL and Judges GABRIELLI and COOKE concur with Judge FUCHSBERG; Judge JONES dissents and votes to reverse in a separate opinion in which Judges JASEN and WACHTLER concur.

In each case: Judgment affirmed, with costs.

# APPENDIX C

## Order of the Court of Appeals Denying Reargument

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of February A.D. 1978.

Present—Hon. CHARLES D. BREITEL, *Chief Judge, presiding.*

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Mo. No. 126

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CITIBANK, N.A. (FORMERLY KNOWN AS FIRST NATIONAL CITY BANK),
*Appellant,*

*vs.*

THE CITY OF NEW YORK FINANCE ADMINISTRATION,
*Respondent,*

To review &c.

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THE CHASE MANHATTAN BANK, N.A.,
*Appellant,*

*vs.*

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK, ET AL.,
*Respondents,*

For a Judgment &c.

A motion for reargument in the above cause having heretofore been made upon the part of the appellants herein and

*Order of the Court of Appeals Denying Reargument*

papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ JOSEPH W. BELLACOSA

Joseph W. Bellacosa
Clerk of the Court



# APPENDIX D

## Decision of the Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 6, 1976.

Present—Hon. THEODORE R. KUPFERMAN, *Justice Presiding,*
FRANCIS T. MURPHY, JR.,
VINCENT A. LUPIANO,
SAMUEL J. SILVERMAN,
EMILIO NUNEZ, *Justices.*

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3691

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CITIBANK, N.A. (FORMERLY KNOWN AS FIRST NATIONAL CITY BANK),
*Petitioner,*

*—against—*

THE CITY OF NEW YORK FINANCE ADMINISTRATION,
*Respondent,*

To review, pursuant to Article 78 CPLR, a Final Determination, etc.

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3692

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THE CHASE MANHATTAN BANK, N.A.,
*Petitioner,*

*—against—*

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK AND IVAN E. IRIZZARY AS FINANCE ADMINISTRATOR OF THE CITY OF NEW YORK,
*Respondents,*

For a Judgment under Article 78 of the Civil Practice Law and Rules.

*Decision of the Appellate Division*

Determinations of respondents, dated December 8, 1975 and March 29, 1976, respectively, confirmed and the petitions dismissed. Respondents shall recover of petitioners $60 costs and disbursements of this proceeding. Concur—Kupferman, J. P., Murphy, Lupiano and Nunez, JJ., Silverman, J., dissents in the following memorandum: In my view, as a matter of law the amendatory legislation of 1970 remained "state legislation in effect prior to the enactment" of the 1969 amendment of section 5219 of the United States Revised Statutes (US Code, tit 12, § 548), and did not constitute that "affirmative action of the State Legislature after the enactment of this Act," required by Public Law No. 91-156 (83 US Stat 434), as amended by Public Law No. 92-213 (85 US Stat 775). Accordingly, I would annul the determination of the City Finance Administration imposing the New York City commercial rent and occupancy tax on petitioners national banks for the period prior to January 1, 1973.



# APPENDIX E

## Final Determination—The Chase Manhattan Bank, N.A.

LETTERHEAD OF
THE CITY OF NEW YORK
FINANCE ADMINISTRATION
OFFICE OF LEGAL AFFAIRS
HEARING BUREAU
225 Broadway, New York, N.Y. 10007

FINAL DETERMINATION

DATE March 29, 1976

IN RE: Commercial Rent or Occupancy Tax

AUDIT NO. UC-41221

REG. NO. M-500329-8 1-500329-6

EMP. IDENT. NO. 13 | 2633612

NAME The Chase Manhattan Bank, N.A.
ADDRESS One Chase Manhattan Plaza
New York, New York 10015

The Chase Manhattan Bank, N.A.
One Chase Manhattan Plaza
New York, New York 10015

Notice is hereby given, pursuant to the Administrative Code of the City of New York, that there is due and payable to the City of New York a Commercial Rent Tax

*Final Determination—The Chase Manhattan Bank, N.A.*

Deficiency in the amounts and for the periods set forth below.

| | Summary of Tax Deficiency | | |
|---|---|---|---|
| Periods | Principal | Int.-Pen | Total |
| 6/1/69-5/31/70 | $ –0– | $ –0– | $ –0– |
| 6/1/70-5/31/71 | 1,054,573.74 | 494,331.44 | 1,548,905.18 |
| 6/1/71-5/31/72 | 1,123,357.94 | 425,469.82 | 1,548,827.76 |
| | | (4/20/76) | |
| Total Amount Due | $2,177,931.68 | $919,801.26 | $3,097,732.94 |

This determination is final and irrevocable. Additional interest accrues at the rate of 1% per month unless payment is received within ten (10) days from the date hereof. Failure to remit promptly will cause the Finance Administration of the City of New York to issue and docket a warrant as provided for by law.

MAIL YOUR REMITTANCE TO THE OFFICE OF THE CITY COLLECTOR AT 79 WORTH STREET, NEW YORK, N. Y. In order to obtain proper credit for payment, please attach thereto a copy of this notice.

IN REPLY REFER TO: HEARING BUREAU—17th Floor.

Very truly yours,

Finance Administrator

by: /s/ LAWRENCE M. GETELMAN
*Acting Chief, Hearing Bureau*

cc: J. PAUL MCGRATH, ESQ.
Dewey, Ballantine, Bushby,
Palmer & Wood
140 Broadway
New York, New York 10005



## Findings of Fact, Conclusions of Law and Decision—The Chase Manhattan Bank, N.A.

The Chase Manhattan Bank, N.A.
One Chase Manhattan Plaza
New York, New York 10015

Audit No. UC-41221
Registration No. M-500329-8
1-500329-6
Employer Ident. No.
13-2633-612

FINDINGS

Facts:

1. The Chase Manhattan Bank, N.A., the taxpayer herein, is and was during the audit period of June 1, 1969 to May 31, 1972 a national banking association.

2. Taxpayer filed annual Commercial Rent or Occupancy Tax returns for each of the tax years within the audit period on June 19, 1970, June 21, 1971 and June 20, 1972, respectively, indicating the amount of base rent subject to tax but reporting no tax due on the grounds that it was exempt from such tax.

3. Upon audit by the City, a Notice of Determination dated July 10, 1973 was issued showing a deficiency in Commercial Rent Tax for the audit period as follows:

Period: 6/1/69—5/31/72

| | |
|---|---|
| Principal Tax | $2,659,345.33 |
| Interest to 7/20/73 | 530,603.17 |
| Total Tax Due | $3,189,948.50 |

4. Hearing was requested and scheduled. Formal Hearing was held and concluded.

5. At the formal hearing, taxpayer contended that even if it were liable for the Commercial Rent or Occupancy Tax during the audit period, the assessment for the period from June 1, 1969 to May 31, 1970 was barred by the Statute of Limitations, pursuant to Section L46-17.0 (b) of the Administrative Code of the City of New York, since the tax return for that period was filed on June 19, 1970 and the Notice of Determination was not issued until July 10, 1973.

6. Section L46-17.0 (b) of the Administrative Code of the City of New York provides in part that ". . . except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the final return for the tax year to which the assessment relates. . . ."

7. The attorney for the taxpayer conceded the accuracy of the figures and the mathematics used by the City's auditor in computing the total Commercial Rent or Occupancy Tax deficiency herein.

8. The taxpayer failed to show that it was not liable for Commercial Rent or Occupancy Tax as a tenant that occupied and used premises within the City of New York, for which it paid rent, for the purpose of carrying on its business and its commercial activities, from June 1, 1970 to May 31, 1972.



Conclusion:

1. The taxpayer, The Chase Manhattan Bank, N.A., as a tenant, occupied and used various premises within the City of New York for the purpose of carrying on its business and its commercial activities.

2. The Chase Manhattan Bank, N.A., the taxpayer herein, is subject to the Commercial Rent or Occupancy Tax pursuant to Title L of Chapter 46 of the Administrative Code of the City of New York, as authorized by the legislature of the State of New York.

3. Pursuant to Section L46-17.0 (b) of the Administrative Code of the City of New York the Commercial Rent or Occupancy Tax for the period from June 1, 1969 to May 31, 1970 is barred by the Statute of Limitations and, therefore, should be abated as to principal and interest thereon.

Decision:

1. The Commercial Rent or Occupancy Tax determination should be affirmed as follows:

Period: June 1, 1970 to May 31, 1972

| | |
|---|---|
| Principal | $2,177,931.68 |
| Interest to 4/20/76 | 919,801.26 |
| Total Tax Due | $3,097,732.94 |

2. The Commercial Rent or Occupancy Tax determination should be abated for the period from June 1, 1969 to May 31, 1970 in the principal amount of $481,413.65 and the interest thereon.

## Final Determination—Citibank, N.A.

LETTERHEAD OF

THE CITY OF NEW YORK
FINANCE ADMINISTRATION
OFFICE OF LEGAL AFFAIRS
HEARING BUREAU
225 Broadway, New York, N. Y. 10007

FINAL DETERMINATION

DATE December 8, 1975

IN RE: Commercial Rent or Occupancy Tax

AUDIT No. UE-1090

REG. No. 1-666743; M-666743-0

EMP. IDENT. No. 13 | 5266470

NAME First National City Bank

ADDRESS 399 Park Avenue
New York, New York 10022

First National City Bank
399 Park Avenue
New York, New York 10022

Notice is hereby given, pursuant to the Administrative Code of the City of New York, that there is due and payable to the City of New York a Commercial Rent or Occupancy Tax Deficiency in the amounts and for the periods set forth below.



| | Summary of Tax Deficiency | | |
|---|---|---|---|
| Periods | Principal | Int.-Pen. | Total |
| 6/1/69-5/31/70 | $ –0– | $ –0– | $ –0– |
| 6/1/70-5/31/71 | 939,070.33 | 362,715.91 | 1,301,786.24 |
| 6/1/71-5/31/72 | 1,080,905.38 | 320,218.22 | 1,401,123.60 |
| See attached schedule for locations (5/20/75) | | | |
| Total Amount Due | $2,019,975.71 | $682,934.13 | $2,702,909.84 |

This determination is final and irrevocable. Additional interest accrues at the rate of 1% per month unless payment is received within ten (10) days from the date hereof. Failure to remit promptly will cause the Finance Administration of the City of New York to issue and docket a warrant as provided for by law.

MAIL YOUR REMITTANCE TO THE OFFICE OF THE CITY COLLECTOR AT 79 WORTH STREET, NEW YORK, N. Y. In order to obtain proper credit for payment, please attach thereto a copy of this notice.

IN REPLY REFER TO: HEARING BUREAU—17TH FLOOR

Very truly yours,

Finance Administrator

by: /s/ LAWRENCE M. GETELMAN
*Acting Chief, Hearing Bureau*

cc: Shearman & Sterling, Esqs.
53 Wall Street
New York, New York 10005
Att: EDWARD J. BOYLE, ESQ.

## Findings of Fact, Conclusions of Law and Decision— Citibank, N.A.

First National City Bank
399 Park Avenue
New York, New York 10022

Audit Number: UE-1090

Registration Number: 1-666743-0
M-666743-0

Employer's Identification Number: 13-5266470

### FINDINGS

Facts:

1. First National City Bank, the taxpayer herein, is a national banking association, which was assessed by the City of New York, for a Commercial Rent or Occupancy Tax deficiency, pursuant to a notice of determination dated February 1, 1973, as follows:

Period: 6/1/69-5/31/72

| | |
|---|---|
| Principal Tax | $2,484,247.11 |
| Interest to 11/20/72 | 345,087.86 |
| Total Tax Due | $2,829,334.97 |

2. Pursuant to a letter, received by the Finance Administration on February 23, 1973, the taxpayer applied for a hearing in this matter.

3. A formal hearing was held to a conclusion on April 28, 1975.



4. At the formal hearing, the attorney for the taxpayer conceded the accuracy of the figures and the mathematics used by the City's auditor in computing the total Commercial Rent or Occupancy Tax deficiency herein.

5. The taxpayer failed to show that it was not liable for commercial rent or occupancy tax as a tenant, that occupied and used premises within the City of New York, for which it paid rent, for the purpose of carrying on its business and its commercial activities, for June 1, 1970 to May 31, 1972.

Conclusion:

1. The taxpayer, First National City Bank, as a tenant, occupied and used various premises within the City of New York for the purpose of carrying on its business and its commercial activities.

2. First National City Bank, the taxpayer herein, is subject to the Commercial Rent or Occupancy Tax pursuant to Title L of Chapter 46 of the Administrative Code of the City of New York, as authorized by the legislature of the State of New York.

3. Pursuant to Federal Law, the Commercial Rent or Occupancy Tax for the period June 1, 1969 to May 31, 1970 should be abated as to principal and interest thereon.

Decision:

1. The Commercial Rent or Occupancy Tax Determination should be affirmed as follows:

Period: June 1, 1970 to May 31, 1972

| | |
|---|---|
| Principal | $2,019,975.71 |
| Interest to 5/20/75 | 682,934.13 |
| Total Tax Due | $2,702,909.84 |

2. The Commercial Rent or Occupany Tax determination should be abated for the period from June 1, 1969 to May 31, 1970 in the principal amount of $464,271.40 and the interest thereon.



## Section 5219 of the Revised Statutes of the United States, 12 U.S.C. §548 (1957)

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or

*Section 5219 of the Revised Statutes of the United States, 12 U.S.C. §548 (1957)*

according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section.



# APPENDIX G

## Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434

AN ACT

To clarify the liability of national banks for certain taxes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### § 1. Temporary amendment of section 5219, Revised Statutes

(a) Section 5219 of the Revised Statutes (12 U.S.C. 548) is amended by adding at the end thereof the following:

"5. (a) In addition to the other methods of taxation authorized by the foregoing provisions of this section and subject to the limitations and restrictions specifically set forth in such provisions, a State or political subdivision thereof may impose any tax which is imposed generally on a nondiscriminatory basis throughout the jurisdiction of such State or political subdivision (other than a tax on intangible personal property) on a national bank having its principal office within such State in the same manner and to the same extent as such tax is imposed on a bank organized and existing under the laws of such State.

"(b) Except as otherwise herein provided, the legislature of each State may impose, and may authorize any political subdivision thereof to impose, the following taxes on a national bank not having its principal office located within the jurisdiction of such State, if such taxes are imposed generally throughout such jurisdiction on a nondiscriminatory basis:

"(1) Sales taxes and use taxes complementary thereto upon purchases, sales, and use within such jurisdiction.

"(2) Taxes on real property or on the occupancy of real property located within such jurisdiction.

"(3) Taxes (including documentary stamp taxes) on the execution, delivery, or recordation of documents within such jurisdiction.

"(4) Taxes on tangible personal property (not including cash or currency) located within such jurisdiction.

"(5) License, registration, transfer, excise, or other fees or taxes imposed on the ownership, use, or transfer of tangible personal property located within such jurisdiction.

"(c) No sales tax or use tax complementary thereto shall be imposed pursuant to this paragraph 5 upon purchases, sales, and use within the taxing jurisdiction of tangible personal property which is the subject matter of a written contract of purchase entered into by a national bank prior to September 1, 1969.

"(d) As used in this paragraph 5, the term 'State' means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam."

(b) The amendment made by subsection (a) of this section shall be effective from the date of enactment of this Act until the effective date of the amendment made by section 2(a) of this Act.



**§ 2. Permanent amendment of section 5219, Revised Statutes**

(a) Section 5219 of the Revised Statutes (12 U.S.C. 548) is amended to read:

"SEC. 5219. For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located."

(b) The amendment made by subsection (a) becomes effective on January 1, 1972.

**§ 3. Saving provision**

(a) Except as provided in subsection (b) of this section, prior to January 1, 1972, no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless

(1) the tax was imposed on that class of banks prior to the enactment of this Act, or

(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act.

(b) The prohibition of subsection (a) of this section does not apply to

(1) any sales tax or use tax complementary thereto,

(2) any tax (including a documentary stamp tax) on the execution, delivery, or recordation of documents, or

*Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434*

(3) any tax on tangible personal property (not including cash or currency), or for any license, registration, transfer, excise or other fee or tax imposed on the ownership, use or transfer of tangible personal property,

imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof.

**§ 4. Study by Board of Governors of the Federal Reserve System**

(a) The Board of Governors of the Federal Reserve System (hereinafter referred to as the "Board") shall make a study to determine the probable impact on the banking systems and other economic effects of the changes in existing law to be made by section 2 of this Act governing income taxes, intangible property taxes, so-called doing business taxes, and any other similar taxes which are or may be imposed on banks. In conducting the study the Board shall consult with the Secretary of the Treasury and appropriate State banking and taxing authorities.

(b) The Board shall make a report of the results of its study to the Congress not later than December 31, 1970. The report shall include the Board's recommendations as to what additional Federal legislation, if any, may be needed to reconcile the promotion of the economic efficiency of the banking systems of the Nation with the achievement of effectiveness and local autonomy in meeting the fiscal needs of the States and their political subdivisions.



**Act of December 22, 1971, Pub. L. No. 92-213, §4(a), 85 Stat. 775**

EXTENSION OF DATES APPLICABLE TO CERTAIN PROVISIONS OF LAW RELATING TO THE TAXATION OF NATIONAL BANKS

SEC. 4. (a) The Act entitled "An Act to clarify the liability of national banks for certain taxes", approved December 24, 1969 (83 Stat. 434), is amended by striking out "1972" in sections 2(b) and 3(a) and inserting in lieu thereof "1973".

• • •

# APPENDIX H

## Laws of New York, 1963, ch. 257

An Act to enable any city having a population of one million or more to impose and collect taxes on rent or occupancy.

Became a law April 3, 1963, with the approval of the Governor.

Effective as shown in § 2.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. (1) Notwithstanding any other provision of law to the contrary, any city having a population of one million or more is hereby authorized and empowered to adopt and amend local laws imposing in any such city a tax such as the legislature has or would have the power and authority to impose on persons occupying premises in such city for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity, measured by the rent paid for the use or occupancy of such premises, but not to exceed two and one-half percentum of such rent where the rent is not in excess of twenty-five hundred dollars per year or where the rent is for a period of less than one year and would not exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year and not to exceed five percentum of such rent where the rent is in excess of twenty-five hundred dollars per year or where the rent is for a period of less than one year and would exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year.

(2) Such tax may be collected and administered by the director of finance or other fiscal officers of such city by such means and in such manner as other taxes which are now collected and administered by such officers in accordance with the charter or administrative code of any such city or as otherwise may be provided by such local law.

(3) When used in this act the following terms and expressions shall mean and include:

a. "Person." An individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, or any other person acting in a fiduciary capacity, whether appointed by a court or otherwise, and any combination of individuals.

b. "Premises." Any real property or part thereof, and any structure thereon or space therein.

c. "Rent." The amount, whether received in money or otherwise, paid by any lessee, sublessee, licensee or concessionaire for the right or permission to occupy the premises, including the amount so paid even though based on a share of profits.

(4) Such local laws may provide that any tax imposed shall be paid by the person liable therefor to the owner of the premises occupied or to the person entitled to be paid the rent for the premises occupied for and on account of the city imposing the tax and that such owner or person entitled to be paid the rent shall be liable for the collection and payment of the tax; and that such owner or person entitled to be paid the rent shall have the same right in respect to collecting the tax from the person occupying the premises, or in respect to non-payment of the tax by the person occupying the premises, as if the tax were a part of the rent and



payable at the same time as the rent; provided, however, that the director of finance or other fiscal officers of such city, specified in such local law, shall be joined as a party in any action or proceeding brought to collect the tax by the owner or by the person entitled to be paid the rent.

(5) Such local laws may provide that the lower rate or rates of tax provided therein for rents not in excess of twenty-five hundred dollars shall be applicable to rents in excess of that amount and may provide for different rates of tax, not in excess of those specified in subdivision one hereof, for rents in excess of twenty-five hundred dollars or for rents not in excess of that amount; and may provide for exclusions or exemptions from such tax other than those specified in this act.

(6) Such local laws may provide for the filing of returns and the payment of the tax on a monthly basis or on the basis of any longer or shorter period of time.

(7) This act shall not authorize the imposition of such tax upon the following:

a. The state of New York, or any public corporation (including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada), improvement district or other political subdivision of the state;

b. The United States of America, insofar as it is immune from taxation;

c. The United Nations or other world-wide international organizations of which the United States of America is a member; and

d. Any corporation, or association, or trust, or community chest, fund or foundation, organized and operated

exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals, and no part of the net earnings of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; provided, however, that nothing in this paragraph shall include an organization operated for the primary purpose of carrying on a trade or business for profit, whether or not all of its profits are payable to one or more organizations described in this paragraph.

(8) Any final determination of the amount of any tax payable hereunder shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice act if application therefor is made to the supreme court within thirty days after the giving of the notice of such final determination, provided, however, that any such proceeding under article seventy-eight of the civil practice act shall not be instituted unless (a) the amount of any tax sought to be reviewed, with such interest and penalties thereon as may be provided for by local law or regulation, shall be first deposited and there is filed an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding or (b) at the option of the petitioner such undertaking may be in a sum sufficient to cover the taxes, interest and penalties



stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the petitioner shall not be required to pay such taxes, interest or penalties as a condition precedent to the application.

(9) Where any tax imposed hereunder shall have been erroneously, illegally or unconstitutionally collected and application for the refund thereof duly made to the proper fiscal officer or officers, and such officer or officers shall have made a determination denying such refund, such determination shall be reviewable by a proceeding under article seventy-eight of the civil practice act, provided, however, that such proceeding is instituted within thirty days after the giving of the notice of such denial, that a final determination of tax due was not previously made, and that an undertaking is filed with the proper fiscal officer or officers in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

(10) Except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return, provided, however, that where no return has been filed as provided by law the tax may be assessed at any time.

(11) Revenues resulting from the imposition of tax authorized by this act shall be paid into the treasury of any such city and shall be credited to and deposited in the general fund of any such city.

(12) If any provision of this act or the application thereof to any person or circumstance shall be held invalid, the remainder of this act and the application of such provision to other persons or circumstances shall not be affected thereby.

§ 2. This act shall take effect June first, nineteen hundred sixty-three, except that local laws may be adopted or amended pursuant to this act before such date to take effect on or after June first, nineteen hundred sixty-three.



## Laws of New York, 1970, ch. 166

An Act to amend chapter two hundred fifty-seven of the laws of nineteen hundred sixty-three, entitled "An Act to enable any city having a population of one million or more to impose and collect taxes on rent or occupancy," in relation to restructuring the rates of such taxes and to increase the rate of taxes in certain instances and repealing a portion in relation thereto.

Approved and effective April 22, 1970.

Passed on message of necessity. See Const. art. IX, § 2(b) (2), and McKinney's Legislative Law § 44.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision one of section one of chapter two hundred fifty-seven of the laws of nineteen hundred sixty-three, entitled "An act to enable any city having a population of one million or more to impose and collect taxes on rent or occupancy," is hereby amended to read as follows:

(1) Notwithstanding any other provision of law to the contrary, any city having a population of one million or more is hereby authorized and empowered to adopt and amend local laws imposing in any such city a tax such as the legislature has or would have the power and authority to impose on persons occupying premises in such city for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity, measured by the rent paid for the use [or] occupancy of such premises, but, for periods embraced in the period beginning June first, nineteen hundred sixty-three and ending May thirty-first, nineteen hundred seventy, not to exceed two and

Changes or additions in text are indicated by underline, deletions by strikeouts.

one-half percentum of such rent where the rent is not in excess of twenty-five hundred dollars per year or where the rent is for a period of less than one year and would not exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year and not to exceed five percentum of such rent where the rent is in excess of twenty-five hundred dollars per year or where the rent is for a period of less than one year and would exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year. For periods beginning after May thirty-first, nineteen hundred seventy such tax shall be imposed at the rates shown in the following table. Where the rent is for a period of less than one year, the rate shall be determined by assuming that the rent is on an equivalent basis for the entire year.

| Where the annual rent is: | But not more than: | The rate shall be: |
|---|---|---|
| 0 | $ 2499 | 2½% of the rent |
| $ 2500 or over | $ 4999 | 5% of the rent |
| $ 5000 or over | $ 7999 | 6¼% of the rent |
| $ 8000 or over | $10999 | 7% of the rent |
| $11000 and over | | 7½% of the rent |

§ 2. Subdivision five of section one of such chapter is hereby repealed.

§ 3. This act shall take effect immediately.